Supreme Court, U.S.
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No. 91-270

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CITY OF NEWPORT BEACH, a California City,
Petitioner,

v.

TIMOTHY HAMMER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF CALIFORNIA, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Joined by the States of Delaware, Idaho, Indiana, Maine, Mississippi, Missouri, New Hampshire, Nevada, South Carolina, South Dakota; California Counties of Orange and Trinity; City and County of San Francisco; California Cities of Irvine, Laguna Beach, Lawndale, Long Beach, Los Angeles, San Clemente, San Diego, Signal Hill, and Yorba Linda; California Police Officer's Association; California Police Chief's Association; California State Sheriff's Association; and Mothers Against Drunk Driving, National Organization and California State Organization; in support of the City of Newport Beach, Petitioner.

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QUESTIONS PRESENTED

1. Did Graham v. Connor, 490 U.S. 386 (1989), overrule the Schmerber v. California, 384 U.S. 757 (1966), test for determining the constitutionality of the extraction of a blood sample from a nonconsenting drunk driving suspect?

2. Should Graham v. Connor, supra, be applied retroactively to nonconsensual extractions of blood from suspected drunk drivers, and, if so, can such retroactive application be used to render a formerly constitutional city policy unconstitutional for purposes of imposing 42 U.S.C. section 1983 liability on the city?

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INTEREST OF AMICUS CURIAE

Amicus curiae is the State of California, joined by other states, California counties and municipalities and organizations interested in the successful prosecution of drunk drivers, and which depend upon blood tests to establish intoxication.[1/]

The effectiveness of these criminal sanctions against drunk driving depends largely on the ability of law enforcement officers to obtain chemical tests of suspected drunk drivers.[2/]

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1. Under California law the offense is defined as driving "under the influence," not "drunk driving," and the prosecution need prove only that the driver was "under the influence" of alcohol, a drug or a combination of the two. (Cal. Veh. Code, §§ 23152, 23153.)

However, for the sake of convenience, and because the offense is commonly referred to throughout the country as "drunk driving," we use the terms "driving under the influence" and "drunk driving" interchangeably herein.

2. In 1985, at the time of respondent Hammer's arrest, California law provided that it was unlawful for a person who had 0.10 percent or more, by

California follows the rule of Schmerber v. California, 384 U.S. 757 (1966). When a drunk driving arrestee refuses a chemical test, the driver's license of the arrestee is not only subject to revocation, but California law permits the officer, for criminal prosecution purposes, to obtain a blood sample from the arrestee under the conditions prescribed in Schmerber, using reasonable force, if necessary under the circumstances, to obtain the sample. (People v. Superior Court (Hawkins), 6 Cal.3d 757, 764-765, 100 Cal.Rptr. 281, 493 P.2d 1145 (1972); Carleton v. Superior Court, 170 Cal.App.3d 1182, 1187-1188 & fn. 1, 216 Cal.Rptr. 890 (1985); People v.

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weight, of alcohol in his blood to drive a vehicle. (Former Cal. Veh. Code, § 23152, subd. (b).)

Current California law has reduced the percent by weight of alcohol to 0.08 percent or more. (Current Cal. Veh. Code, § 23152, subd. (b).)

Ryan, 116 Cal.App.3d 168, 182, 171 Cal.Rptr. 854 (1981); People v. Puccinelli, 63 Cal.App.3d 742, 746, 135 Cal.Rptr. 534 (1976); People v. Brannon, 32 Cal.App.3d 971, 975-976, 108 Cal.Rptr. 620 (1973).)

The effect of the decision in this case, as noted by the five dissenting judges, "is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it." (Hammer v. Gross, 932 F.2d 842, 855 (9th Cir. en banc 1991) dis. opn.)

The Ninth Circuit's decision will seriously impede the ability of law enforcement officers to enforce the law and to successfully prosecute drunk drivers.

SUMMARY OF ARGUMENT

This Court, as well as the California courts, has repeatedly emphasized the grave dangers posed by drunk drivers. (Michigan State Police v. Sitz, 496 U.S.___, 110 L.Ed 2d 412, 420-421 (1990).)

In California alone in 1990 there were 353,886 arrests for misdemeanor drunk driving, another 12,799 arrests for felony drunk driving[3/] and 22,915 cases where drivers licenses were revoked under California's Implied Consent Law because

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3. Under California law, the difference between misdemeanor and felony drunk driving is that felony drunk driving requires an act forbidden by law or neglect of any duty imposed by law in the driving of the vehicle, which proximately causes bodily injury to any person other than the driver (Cal. Veh. Code, § 23153.) Alternatively, the offense is a felony if the person has been convicted within the previous seven years of any combination of three or more separate violations of misdemeanor drunk driving, felony drunk driving or reckless driving reduced from a charge of misdemeanor drunk driving. (Cal. Veh. Code, § 23175, subd. (a).)

the suspected drunk driver refused to submit to a chemical test at the time of arrest. Over 60 times a day, every day of the year, California law enforcement officers alone are confronted with the situation presented by this case: a recalcitrant drunk driver who refuses to submit to a chemical test.

In Schmerber v. California, supra, 384 U.S. 757, this Court held under the Fourth Amendment that a blood sample could lawfully be obtained over the verbal objection of an arrested drunk driver who refused a chemical test, where there was probable cause for the drunk driver's arrest (Schmerber, supra, 384 U.S. at pp. 768-769), there was a "clear indication" the blood test would produce incriminating evidence of intoxication (Id., at pp. 769-770), and the blood sample was obtained "in a reasonable manner" and "according to

accepted medical practices" (Schmerber, supra, 384 U.S. at pp. 771-772).

The plurality of the en banc Ninth Circuit in this case limits Schmerber to cases where no physical resistance is offered by the suspect, and concludes that the jury could properly determine that any use of force was constitutionally excessive under the Fourth Amendment, based upon a five part test, derived from Graham v. Connor, 490 U.S. 386 (1989): (1) whether the suspect "actively resist[s]" the extraction of his blood"; (2) the severity of the crime at issue; (3) whether the suspect posed an immediate threat to the safety of the officers or others; (4) whether the police refused to respect a reasonable request to undergo a different form of testing; and (5) the degree of the authorities' need for the blood sample. (Hammer v. Gross,

supra, 932 F.2d 842, 846, plurality opinion.)

The plurality upholds the finding of a Fourth Amendment violation by the jury because: (1) respondent Hammer's offense of drunk driving "was a misdemeanor" (Hammer v. Gross, supra, 932 F.2d at p. 846; plurality opinion); (2) Hammer, a drunk driver, posed "no threat to the safety of the officers or others" (Ibid.); and (3) Hammer, after twice refusing any form of chemical test, belatedly agreed at the hospital to submit to a breathalyzer test as force was already being applied to obtain a blood sample. (Ibid.)

The plurality opinion misconstrues the significance and effect of Graham v. Connor, and misapplies it in the context of the taking of a blood sample of a lawfully arrested drunk driver, disregarding the express holding

of this Court in Schmerber.

The plurality opinion also misapplies the factors referred to in Graham v. Connor. The plurality improperly denigrates the "severity of the offense" since Hammer was guilty of only "misdemeanor" drunk driving. (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.) Similarly, the plurality opinion inexplicably concludes Hammer, a drunk driver, "certainly posed no threat to the safety of the officers or others." (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The effect of the plurality opinion's five factor analysis would be to require jury trials "just about every time the police take blood," since two out of the five factors identified in the plurality opinion will routinely favor the drunk driver. (Hammer v. Gross, supra,

932 F.2d at p. 853 (Kozinski and Nelson, concurring.)

The analysis in the concurring opinion, which concludes that Hammer's belated consent to a breathalyzer test was sufficient by itself to render any use of force constitutionally unreasonable under the Fourth Amendment (Hammer v. Gross, supra, 932 F.2d at p. 851; Kozinski and Nelson, concurring), is equally faulty.

Although this Court suggested in Schmerber that a drunk driving suspect's "reasonable request" for an alternative form of chemical test might have to be respected (Schmerber, supra, 384 U.S. at p. 760, fn. 4) the officer here acted in a constitutionally reasonable manner in dealing with Hammer's "tergiversation about tests" (Hammer v. Gross, supra, 932 F.2d at p. 855, five judge dis. opn.)

There was no "reasonable request" for an alternative form of

chemical test, within the meaning of Schmerber. California law reasonably provides for a single refusal. Hammer had twice refused any and all chemical tests, his change of heart about taking a breathalyzer test came during the application of force by the officer necessary to obtain a blood sample, and Hammer testified at trial that he twice refused any form of chemical test not for any valid reason, but "because he thought 'there was a good possibility' that a chemical test would indicate that he was intoxicated." (Hammer v. Gross, supra, 932 F.2d at p. 844, plurality opinion.)

The effect of this decision will be to seriously impede the ability of law enforcement officers to enforce the drunk driving laws, and to encourage physical resistance and game playing by drunk driving suspects.

The instant case is doubly unfortunate, because there is no majority opinion resulting from this en banc Ninth Circuit review to guide officers in the future, and they and their employing agencies are left to guess in future cases as to their potential civil liability under 42 U.S.C. section 1983.

ARGUMENT

THE NINTH CIRCUIT EN BANC DECISION CONFLICTS WITH THIS COURT'S DECISION IN SCHMERBER V. CALIFORNIA, MISREADS THIS COURT'S DECISION IN GRAHAM V. CONNOR, AND SERIOUSLY JEOPARDIZES THE ENFORCEMENT OF STATES' DRUNK DRIVING LAWS BY ENCOURAGING PHYSICAL RESISTANCE AND GAME PLAYING BY DRUNK DRIVING SUSPECTS

In this case a closely divided (6-5, with no majority opinion) en banc Ninth Circuit has reversed a unanimous three judge panel decision, and upheld a

jury award of money damages[4/] in a civil rights action under 42 U.S.C. section 1983 for a Fourth Amendment violation, where a police officer, using only minimal and reasonable force, obtained a blood sample from a resisting drunk driving arrestee who refused any chemical test, under circumstances satisfying all the requirements for obtaining a blood sample established by this Court in Schmerber v. California, supra, 384 U.S. 757.

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4. The award against the individual officer and the chief of police was unanimously overturned by the en banc Ninth Circuit on qualified immunity grounds. (Hammer v. Gross, supra, 932 F.2d at p. 850.)

This does not affect the basic Fourth Amendment issue presented by this case. The municipality was held liable in this case for a Fourth Amendment violation by the officer who took the blood sample. Moreover, after this decision, it is doubtful whether individual officers will be able to rely on even a defense of qualified immunity in the enforcement of California's drunk driving laws, since the Ninth Circuit has upheld a jury verdict finding a Fourth Amendment violation in this case.

The en banc Ninth Circuit reaches this conclusion by erroneously limiting the applicability of this Court's decision in Schmerber to cases where there is no physical resistance by the drunk driving suspect and no use of force by the officer to obtain a blood sample, based upon its misreading and misapplication of this Court's recent decision in Graham v. Connor, supra, 490 U.S. 386.

It is important to emphasize at the outset what this case does not involve. The amount of force used by the officer in this case to obtain a blood sample was not excessive. The amount of force used in this case is accurately characterized in the dissenting opinion in this case as "trivial," and no more than "was minimally necessary to safely extract the blood sample." (Hammer v. Gross, supra, 932 F. 2d at p. 855, five judge dis. opn.) This is not disputed in either

the plurality or concurring opinions upholding the jury verdict against the City of Newport Beach. Instead, the Ninth Circuit upheld the jury verdict in this case on the rationale that the use of any force in this case could properly be determined by the jury to be constitutionally excessive under the Fourth Amendment.

As the five dissenting judges point out, the effect of the decision in this case "is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it." (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

It is vitally important for this Court to grant certiorari in this case. Law enforcement officers in California and other states are confronted on a daily basis with drunk drivers who refuse to

submit to a chemical test to determine their level of intoxication.

In California alone in 1990 there were 353,886 arrests for misdemeanor drunk driving, an additional 12,779 arrests for felony drunk driving (Cal. Depart. Justice, Bureau of Criminal Statistics, Crime and Delinquency in California, 1990, pp. 58, 145), and 22,915 revocations of drivers licenses under California's Implied Consent Law because the suspected drunk driver refused to submit to a chemical test at the time of arrest (California Department of Motor Vehicles, 1990, Suspension and Revocation Action Report).[5/]

This means that over 60 times a day, every day of the year, California law

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5. The Suspension and Revocation Report is an internal document produced by the California Department of Motor Vehicles, which handles drivers license suspensions and revocations in California under the Implied Consent Law.

enforcement officers alone are confronted with a recalcitrant drunk driver who refuses to submit to a chemical test. Law enforcement officers in other states are routinely faced with the same situation.

This Court has repeatedly emphasized the danger posed by drunk drivers and the compelling state interest in their effective prosecution. In upholding the constitutionality of highway sobriety checkpoints under the Fourth Amendment, Chief Justice Rehnquist recently emphasized the "magnitude of the drunken driving problem" and the states' interest in eradicating it.

> "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related deaths and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property

> damage.' [Citation] For decades, this Court has 'repeatedly lamented the tragedy.' South Dakota v. Neville, 45 US 553, 558, 74 L Ed 2d 748, 103 S Ct 916 (1983); see Breithaupt v. Abram, 352 US 432, 439, 1 L Ed 2d 448, 77 S Ct 408 (1957) ('The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield')." (Michigan State Police v. Sitz, supra, 496 U.S.___, 110 L.Ed 2d 412, 420-421, fn. omitted.)

(See also Illinois v. Batchelder, 463 U.S. 1112, 1118 (1983), and cases there cited.)

In Schmerber v. California, supra, 384 U.S. 757, this Court established the conditions under which a blood sample may lawfully be obtained under the Fourth Amendment from a suspected drunk driver who verbally refuses to consent to providing a blood sample for testing but who does not physically resist its taking.

In Schmerber, this Court concluded that the taking of a blood sample from a suspected drunk driver

constituted a search and seizure within the meaning of the Fourth Amendment (Schmerber, supra, 384 U.S. at p. 767), but that such a procedure was reasonable under the Fourth Amendment where there was probable cause for the drunk driver's arrest (Schmerber, supra, 384 U.S. at pp. 768-769), there was a "clear indication" the blood test would produce incriminating evidence of intoxication (Id., at pp. 769-770), and the blood sample was obtained "in a reasonable manner" and "according to accepted medical practices" (Id., at pp. 771-772).

The plurality in this case concludes Schmerber is distinguishable because in Schmerber "there was no suggestion of physical resistance by the suspect or use of force by the police." (Hammer v. Gross, supra, 932 F.2d at p. 845, plurality opinion); see also Id., at p. 845 ["As we have said, Schmerber

involved no physical resistance and no use of force."].) The plurality relies on this Court's statements in Schmerber that its judgment was based "'only on the facts of the present record,'" and that its holding in no way indicated that the Constitution "'permits more substantial intrusions or intrusions under other conditions.'" (Hammer v. Gross, supra, 932 F.2d at p. 845, plurality opinion, quoting from Schmerber, supra, 384 U.S. at p. 772.)

The plurality opinion in the instant case too narrowly construes Schmerber and misreads the import of this Court's caveat concerning "more substantial intrusions, or intrusions under other conditions." (Schmerber, supra, 384 U.S. at p. 772.)

While Schmerber involved a defendant who verbally refused to give his consent to taking a blood sample, but

offered no physical resistance, this Court in Schmerber rejected the distinction drawn by the plurality opinion in this case. The Court in Schmerber quoted with approval language from Chief Justice Warren's dissent in Breithaupt v. Abram, 352 U.S. 432 (1957):

> "We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.' Breithaupt v. Abram, 352 U.S., at 441 (Warren, C.J., dissenting. It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force." (Schmerber, supra, 384 U.S. at p. 760, fn. 4, emphasis added.)

In the instant case there was no evidence that the officer initiated the violence, or that he responded to Hammer's resistance with "inappropriate" force. Nor, as discussed in more detail, infra, was there a "reasonable request" by

respondent Hammer to undergo a different form of testing.

In concluding that the jury could properly determine that any use of force to obtain a blood sample was constitutionally excessive, the plurality adopts a five part test, derived from Graham v. Connor, supra, 490 U.S. 386: (1) whether the suspect "actively resist[s]" the extraction of his blood"; (2) the severity of the crime at issue; (3) whether the suspect posed an immediate threat to the safety of the officers or others; (4) whether the police refused to respect a reasonable request to undergo a different form of testing; and (5) the degree of the authorities' need for the blood sample. (Hammer v. Gross, supra, 932 F.2d 842, 846, plurality opinion.)

Notwithstanding that the jury was improperly instructed in this case under the subjective Johnson v. Glick, 481

F.2d 1028, 1033 (2d Cir. 1973) test, repudiated by this Court in Graham v. Connor, supra, the plurality concludes the jury could nevertheless have properly have found a Fourth Amendment violation because: (1) respondent Hammer's offense of drunk driving "was a misdemeanor" (Hammer v. Gross, supra, 932 F.2d at p. 846; plurality opinion); (2) Hammer, a drunk driver, posed "no threat to the safety of the officers or others" (Ibid.); and (3) Hammer, after twice refusing any form of chemical test, belatedly agreed at the hospital to submit to a breathalyzer test as force was already being applied to obtain a blood sample. (Ibid.)

The Ninth Circuit has misconstrued the significance and effect of Graham v. Connor.

Graham v. Connor mandated an objective rather than a subjective evaluation of the reasonableness of the

officer's actions. (Graham, supra, 490 U.S. at p. 397), and held that the jury had been improperly instructed under the subjective test formulated in Johnson v. Glick, supra, 481 F.2d 1028, 1033.

The plurality opinion fails to recognize that Schmerber itself applied an objective "reasonableness" analysis and concluded that the taking of a blood sample after a refusal of a chemical test by a drunk driving suspect was objectively reasonable under the Fourth Amendment where there was probable cause to arrest, a "clear indication" the blood test would yield incriminating evidence of intoxication, medically accepted procedures were employed and no more than appropriate force was used. Graham v. Connor does not change either this Court's analysis or conclusion in Schmerber, and the plurality in this case erred in reading Graham v. Connor otherwise.

The plurality seriously misapplies the Graham factors in the present context, given what this Court held in Schmerber. This Court made clear that the proper application of the reasonableness requirement of the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case . . ." (Graham v. Connor, supra, 490 U.S. at p. 396.)

With respect to the "severity of the offense," the plurality opinion in the instant case improperly denigrates the importance of the state interest, reasoning that Hammer was arrested only for "misdemeanor" drunk driving. (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The plurality opinion supports this distinction by noting that in Schmerber "the offense was potentially a felony, because a person had been injured.

(Schmerber, 384 U.S. at 768-69 n. 12, 86 S.Ct. at 1834-1835 n. 12." (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The plurality opinion ignores that Schmerber involved a misdemeanor conviction of driving under the influence, just as in the instant case. (Schmerber, supra, 384 U.S. at p. 758, fn. 1.) More importantly, the fact that Schmerber could have been charged with a felony played no part whatever in the reasoning of this Court in Schmerber. Instead, this Court's analysis was premised on the severe danger any drunk driver presents to the safety of the public.

The plurality's attempted distinction of Schmerber in this respect is based on a serious misperception concerning the true nature of the state's compelling interest with respect to prosecuting drunk drivers. The very

reason for obtaining a blood sample from a "misdemeanor" drunk driver is to remove him from the road before a felony occurs.

Moreover, the plurality's distinction would seriously undermine the utility of this Court's decision in Schmerber since the overwhelming majority of arrests in California are for misdemeanor drunk driving.[6/]

Similarly, the plurality opinion inexplicably misapprehends the question of whether Hammer posed "an immediate threat to the safety of the officers or others." The plurality opinion fails to explain why Hammer, a drunk driver, was not a danger to others on the road, and simply states: "Hammer certainly posed no threat to the safety of the officers or others."

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6. As previously noted by amicus curiae, there were 353,886 arrests for misdemeanor drunk driving in California in 1989, and 12,799 arrests for felony drunk driving.

(Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The plurality opinion's analysis and cavalier treatment of "misdemeanor" drunk driving, coupled with its suggestion that Hammer posed "no threat to the safety of the officers or others", simply cannot be reconciled with this Court's repeated pronouncements concerning "the magnitude of the drunken driving problem or the States' interest in eradicating it." (Michigan State Police v. Sitz, supra, 496 U.S.___, 110 L.Ed 2d 412, 420-421, fn. omitted.)

Not only does the plurality opinion misconstrue the impact and effect of Graham v. Connor, and misapply its factors in the present context, but the effect of the plurality opinion's analysis would be to require jury trials "just about every time the police take blood," (Hammer v. Gross, supra, 932 F.2d at p.

853; Kozinski and Nelson, concurring) since under the plurality analysis the drunk driver starts out with two of the five factors in his favor since the great majority of drunk driving arrests are for "mere misdemeanors" and "none will involve the taking of blood to neutralize a threat to the officers." (Hammer v. Gross, supra, 932 F.2d at p. 853, [Kozinski and Nelson, concurring].)

However, the alternative analysis put forward in the concurring opinion to support the finding of a Fourth Amendment violation is equally faulty.

The concurring opinion of Judges Kozinski and Nelson finds a single factor constitutionally dispositive: Hammer's belated consent to a breathalyzer test. (Hammer v. Gross, supra, 932 F.2d at p. 851, [Kozinski and Nelson, concurring].)

Both the plurality opinion and the concurring opinion of Judges Kozinski

and Nelson conclude that there was no legitimate interest in compelling a blood test after Hammer belatedly agreed to an alternative form of testing. (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion; Id., at pp. 851-853, conc. opn.)

The plurality opinion refers to this Court's statement in Schmerber:

> "It is also appropriate to consider whether the police 'refused to respect a reasonable request to undergo a different form of testing.' Schmerber, 384 U.S. at 760 n. 4, 86 S.Ct. at 1830 n. 4." (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

Both the plurality and concurring opinion are based on a fundamental misinterpretation of the footnote in Schmerber. There was no "reasonable request" by respondent Hammer in this case to undergo a different form of testing. California law provides for a single refusal of all three tests, and Hammer had

twice refused any and all chemical tests. Moreover, his change of heart about taking a breathalyzer test came during the application of force by the officer necessary to obtain a blood sample, and Hammer himself testified he twice refused any chemical test "because he thought 'there was a good possibility' that a chemical test would indicate that he was intoxicated." (Hammer v. Gross, supra, 932 F.2d at p. 844, plurality opinion.)

The officer here acted in a constitutionally reasonable manner in dealing with Hammer's "tergiversation about tests" (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

California, like most states, gives a drunk driving suspect an initial choice of alternate chemical tests, i.e. blood, breath or urine, but further provides that if the drunk driver refuses all three of the choices, he impliedly

consents to the chemical test selected by the officer (Cal. Veh. Code, § 23157, subd. (a)(1)), and has no right to subsequently request an alternative chemical test.

As the dissenting judges correctly observe:

> "The California courts have also wisely indicated that [California Vehicle Code] section 13353 grants a person a single opportunity to submit to a blood alcohol test. Once a person refuses, the police are not obligated to give the person a second opportunity to comply with the statute. See Dunlap v. Department of Motor Vehicles, 156 Cal.App.3d 279, 283, 202 Cal.Rptr. 729 (1984) (police not required to give person second opportunity to take blood alcohol test after initial refusal); Morphew v. Department of Motor Vehicles, 137 Cal.App.3d 738, 743-744, 188 Cal.Rptr. 126 (1982) (person lawfully arrested for drunk driving may not avoid impact of section 13353 by frustrating officer's ability to administer blood alcohol test.) I say this is a wise approach because, whatever might seem ideal to those who have months to ruminate on the situation, it does not seem reasonable to

> require officers to deal with a driver's tergiversation about tests." (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

Judge Kozinski suggests in his concurring opinion that California's "one bite" or single refusal rule is beside the constitutional point:

> "Rules of this sort have no bearing on our constitutional analysis; state law cannot render reasonable that which is not." (Hammer v. Gross, supra, 932 F.2d at p. 854, Kozinski and Nelson, concurring.)

The concurring opinion gives controlling significance to a belated and hence unreasonable consent to a different form of chemical test. This is not a case where state law renders "reasonable that which is not." (Hammer v. Gross, supra, 932 F.2d at p. 854, Kozinski and Nelson, concurring.) California's single refusal rule is entirely reasonable, as was the officer's reliance on it here. It was Hammer's game playing and "tergiversation

about tests" which was not. (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

In concluding that there was no legitimate state interest in a blood test after Hammer belatedly agreed to a breathalyzer test, the plurality and concurring opinions also ignore the fact that a blood test does more than a breathalyzer test, since it tests for drugs as well as alcohol. (See Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 610 (1989) [Federal Railroad Administration placed primary reliance in their rules "on analysis of blood samples, as blood is 'the only available body fluid . . . that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects.' 49 Fed. Reg. 24291 (1984)."].)

The California Implied Consent Law specifically provides, as it did at

the time of respondent Hammer's arrest, that a person lawfully arrested for driving under the influence is deemed to have given his consent not only to a "blood, breath or urine" test "for the purpose of determining the alcoholic content of his or her blood," but also to have given his consent to a "blood or urine" test "for the purpose of determining the drug content of his of her blood . . ." (Cal. Veh. Code, § 23157, subd. (a)(1).) Since Hammer twice refused all three of the tests, it was entirely reasonable for the officer to select the particular test which would be most informative for prosecutorial purposes under state law.

In addition, California law expressly defines the offense of driving under the influence of alcohol by the "percent, by weight, of alcohol <u>in a</u>

person's blood." (Cal. Veh. Code, §§ 23152, 23153, 23155; emphasis added.)

This Court specifically concluded in Schmerber that a blood test was a "reasonable" and "highly effective" means of determining the degree to which a person is under the influence of alcohol, and characterized it as a "commonplace" procedure which for most people "involves virtually no risk, trauma, or pain." (Schmerber, supra, 384 U.S. at p. 771.)

The officer's demand for a blood test after Hammer had twice refused any and all tests was constitutionally reasonable under the Fourth Amendment.

The effect of the majority's conclusion in this case is well described by the five dissenting judges:

> "While the majority avoids saying so, the effect of its decision is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it."

(Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.; emphasis added; fn. omitted.)

Both the plurality and the concurring opinions of the en banc Ninth Circuit in this case are in direct conflict with this Court's decision in Schmerber v. California, supra, 384 U.S. 757, as well as with California law since it follows Schmerber. The plurality decision misconstrues and misapplies this Court's decision in Graham v. Connor, supra, and ignores the controlling force of Schmerber. The effect of this decision will be to seriously impede the ability of law enforcement officers to enforce the drunk driving laws and to successfully prosecute drunk drivers by encouraging physical resistance and game playing by drunk driving suspects.

The instant case is doubly unfortunate, because not only does it uphold the jury verdict against the

municipality for the obtaining of a blood sample in full compliance with Schmerber, but there is not even a majority opinion to guide officers in the future in the performance of their duties in the enforcement of the California drunk driving laws. The Ninth Circuit has left officers and their employing agencies to guess in future cases as to their potential civil liability under 42 U.S.C. section 1983.

As Judge Kozinski points out in his concurrence, since there is no majority opinion, and the concurring opinion of Judges Kozinski and Nelson explicitly rejects the five factor test adopted by the plurality, the plurality opinion "does not become the law of the circuit." (Hammer v. Gross, supra, 932 F.2d at p. 854, Kozinski and Nelson, concurring.)

As a result, all law enforcement officers in California and throughout the Ninth Circuit now know, if this decision is permitted by this Court to stand, is that the municipality was held liable for a Fourth Amendment violation. Officers and their employing agencies cannot rely upon this Court's decision in Schmerber or previously settled California law which follows Schmerber, and must guess what their liability will be in the future under any given set of facts.

In the view of amicus curiae, this is a totally unacceptable state of the law, and seriously jeopardizes the effective enforcement of California's drunk driving laws, as well as those of every other state.

* * *

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to grant the City of Newport Beach's pending petition for a writ of certiorari.

Respectfully submitted,

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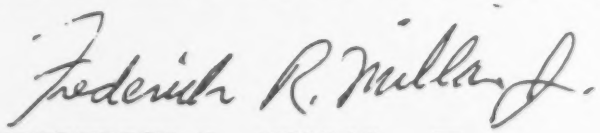

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CERTIFICATE OF SERVICE BY MAIL

No. 91-270

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CITY OF NEWPORT BEACH, a California City,

Petitioner,

v.

TIMOTHY HAMMER,

Respondent.

FREDERICK R. MILLAR, JR., a member of the Bar of the Supreme Court of the United States, declares:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; telephone: (619)237-7766; that on September 23, 1991, he caused to be served the within BRIEF OF AMICUS CURIAE, STATE OF CALIFORNIA, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI in the above-entitled matter, as follows:

To William K. Suter, Clerk, Supreme Court of the United States,

Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and first class postage prepaid deposited in the United States mail at San Diego, California, on the 23th day of September, 1991.

Frederick R. Millar Jr.

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